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No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1964

WYCOFF COMPANY, INCORPORATED, APPELLANT

v.

PUBLIC SERVICE COMMISSION OF UTAH, ET AL.
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE APPELLANT IN OPPOSITION TO THE MOTION TO DISMISS

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At Page 7 of their Motion to Dismiss, appellees oversimplify how the present Utah Motor Carrier Act is to be distinguished from the Florida Motor Carrier Act at the time of *Smith v. Cahoon*, 283 U.S. 553, 75 L. Ed. 1264. No mention is made of the fact that both at the time of said Florida Motor Carrier Act and under the present Utah Motor Carrier Act, *exempt* motor carriers do not (and *regulated carriers* do) have to obtain certificates or permits of authority from; and be regulated by a Public Service Commission. The consequences of this discrimination have already been adequately treated in the Jurisdictional Statement (J.S. 6-7). This discrimination against regulated carriers by reason of the statutory requirement of *certificates* for appellant and other common carriers (or of *permits* for contract carriers) is made apparent by supplying the remainder of the quotation from *Smith v. Cahoon* set forth on Page 8 of appellees' Motion to Dismiss:

> "The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. It applies, without any stated exception, to every auto transportation company within the statutory definition, and this admittedly included the appellant. It not only required an *application for a certificate of public convenience and necessity* but that this should be accompanied by a *schedule of tariffs*, and no such certificate was to be valid without the giving of *a bond* by the applicant for the protection both of the public against injuries and of the persons or property carried. The state commission was explicitly vested with authority to supervise 'every' auto transportation company that was embraced within the definition, to *fix or approve its rates and charges*, to *regulate its service*, to prescribe its *method of keeping accounts* which should set up *adequate depreciation charges*, and generally *to make rules governing its operations. Schedules of rates* of 'every such auto transportation company' were to be open to the public and all *alterations in tariffs* were to be subject to the commission's control." (283 U.S. 562-563, 75 L.Ed. 1272. Emphasis supplied).

The foregoing quotation also has application to the argument made at Page 11 of appellees' Motion to Dismiss that no unconstitutional discrimination exists as long as exempt carriers are subject to some control by the regulatory body. It must be remembered that any regulation by the Public Service Commission of "exempt carriers,"[1] is limited to insurance requirements, safety regulations and accident reports (ibid). Further, any regulations that may be issued by the commission are limited by virtue of the third-from-the-last paragraph of said 54-6-12 (J.S., App. B, p 14a-15a) to those which would "carry out the purposes of this act"; and, as noted, the act specifically excludes ("no portion of this act shall apply") any regulation except as to matters of insurance, safety regulations, and making accident reports.

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[1] So described in 54-6-72, J.S., App. B, p. 130; but note that 54-6-1's definition of "contract motor carrier" by inclusion of all except common motor carriers would of necessity include exempt carriers.

None of the cases cited by appellees are controlling and all have been distinguished both in our brief below to the Utah Supreme Court and in the Jurisdictional Statement at pages 7-8. The State Supreme Court decisions cited by appellees should be given no more weight than the instant decision below.

Perhaps the distinction most worthy of note in the cases relied upon by the appellees are those involving exemptions from tax statutes.[2] Such cases have no application to this case because no tax is involved. *Aero Mayflower Transit Company v. Georgia Public Service Commission*, et al. 295 U.S. 285, 79 L. Ed 1439, 1445, quoted on pages 12 and 13 of appellee's Motion to Dismiss, stops too soon. The opinion continues after the excerpt there reproduced:

> "Be that as it may, exemption from a tax stands upon a different footing, though the purpose of the tax is the upkeep of the highway. At such times the legislature may go far in apportioning and classifying to the end that public burdens may be distributed in accordance with its own conception of policy and justice. If its action be not arbitrary, the courts will stand aloof."

Smith v. Cahoon was followed recently in *Morey v. Doud*, 354 U.S. 457, 1 L. Ed. 2d 1485, 1491, where the Illinois Community Currency Exchanges act required a state license for those issuing money orders; but the American Express Company was excepted from the provisions of the act, and the Court stated:

> "* * * the act (in *Smith v. Cahoon*) excepted motor vehicles carrying specified products. This Court held that the exception violated the Equal Protection Clause since the statutory purpose of protecting the public did not reasonably support a discrimination between

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[2] e.g., *Continental Baking Company v. Woodring*, 286 U.S. 352, 76 L.Ed. 1155; *Hicklin v. Coney*, 290 U.S. 169, 78 L.Ed. 247; *Aero Mayflower Transit Company v. Georgia Public Service Commission*, 295 U.S. 285, 79 L.Ed. 1439; *Sproles v. Binford*, 286 U.S. 374, 76 L.Ed. 1167.

> the carrying of exempt products like farm produce and of regulated products like groceries. 'Such a classification is not based on anything having relation to the purpose for which it is made. Ibid 283 U.S. 567."

The Utah Motor Carrier act similarly creates an unlawful discrimination between exempt and nonexempt carriers that causes said act to be unconstitutional under the Equal Protection Clause.

Respectfully submitted,

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Attorney for Wycoff Company, Incorporated

September, 1964

PROOF OF SERVICE

I, Wayne C. Durham, Attorney for Wycoff Company, Incorporated, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of September, 1964, I served copies of the foregoing *Brief for the Appellant in Opposition to the Motion to Dismiss* on the several parties thereto, as follows:

On Public Service Commission of Utah, Hal S. Bennett, Donald Hacking and Raymond W. Gee, its Commissioners, by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to A. Pratt Kesler, Esquire, Attorney General, and H. Wright Volker, Esquire, Assistant Attorney General, State Capitol, Salt Lake City, Utah; and to Keith E. Sohm, Esquire, Commerce Attorney, Public Service Commission, State Capitol, Salt Lake City, Utah.

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